No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,
Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Respondents.

On Petition for Certiorari
to the Supreme Court of Georgia

PETITIONER'S REPLY BRIEF

Counsel of Record
for Petitioner:
JAMES B. BEAM DISTILLING CO.,

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611
(312) 664-8998

Additional Counsel:

MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

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Petitioner JAMES B. BEAM DISTILLING CO. respectfully submits this Reply Brief to the Brief in Opposition by Respondents State of Georgia, Joe Frank Harris, Marcus E. Collins and Claude L. Vickers to the Petition for Writ of Certiorari to the Supreme Court of Georgia.

I. INTRODUCTION

In *James B. Beam Distilling Co. v. State of Georgia*, 259 Ga. 363, 382 S.E. 2d 95 (1989) (hereinafter "*Beam*"), the Georgia Supreme Court upheld the trial court's ruling holding former section 3-4-60 of the Official Code of

Georgia Annotated to be unconstitutional in violation of the Commerce Clause of the United States Constitution. Section 3-4-60, which has since been superseded, granted preferential taxing treatment to alcoholic beverages manufactured from Georgia-grown products. The issue before this Court on Petition for Certiorari is whether the trial court and Georgia Supreme Court properly applied their decisions prospectively only, so as to deny Petitioner a refund of the taxes paid pursuant to the offending statute in 1982, 1983 and 1984.

Respondents contend that the Petition for Grant of Certiorari of James B. Beam Distilling Co. ("Beam") should be denied because the Petition raises a federal claim (Due Process under the Fourteenth Amendment) that had not been considered by the State court(s). Brief of Respondents at p. 8. Respondents also dispute Beam's claim that this case is factually indistinguishable from *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, 109 S.Ct. 3238 (1989), *former decision*, 109 S.Ct. 389 (1988), *case below*, 524 So.2d 1000 (1988), and thus should be considered and decided along with *McKesson*. Brief of Respondents at pp. 6-7.

II. A FEDERAL QUESTION WAS PROPERLY RAISED AND PASSED UPON BY THE STATE COURTS

Without doubt, Beam paid taxes in the amount of $2.4 million pursuant to an unconstitutional statute. Both the trial court and the Georgia Supreme Court reached and agreed upon that conclusion without difficulty. The

Georgia Supreme Court disposed of that issue in one paragraph in its July 14, 1989 ruling:

> The State appeals the trial court's decision that the pre-1985 version of O.C.G.A. § 3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the commerce clause of the U.S. Constitution. *Id.*

Beam, 259 Ga. at 364, 382 S.E. 2d at 96 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049 (1984)).

In *Bacchus* this Court held that a statute nearly identical in its operation to O.C.G.A. § 3-4-60 (Appendix, Exhibit "B") constituted simple economic protectionism in violation of the Commerce Clause by discriminating in favor of locally grown products. The rulings of the trial court and the Georgia Supreme Court were mandated by *Bacchus* and its antecedents. Thus, the critical issue before the trial court and the Georgia Supreme Court was whether to apply the *Bacchus* decision retroactively so as to grant a refund of the taxes paid under the unconstitutional statute, or prospectively only so as to protect the state treasury. *See American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377, 378 (1988), *cert. granted*, ___ U.S. ___, 109 S.Ct. 389 (1988) (where state statute held void by state court pursuant to decision of U.S. Supreme Court, issue is whether to apply *Supreme Court* ruling retroactively).

Whether to apply retroactively a decision of the United States Supreme Court constitutes a federal question. This Court may declare whether its decisions are to

be given retroactive or prospective application. The guidelines for making a determination as to whether decisions are to be given retroactive effect were established by this Court in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). In the instant case, the Georgia Supreme Court acknowledged that its determination of the retroactivity issue was governed by *Chevron* and purported to apply the criteria set forth therein. *See generally Beam*, 259 Ga. at 364-65, 382 S.E. 2d at 96-97.

In *Bacchus*, this Court expressed its federal constitutional interest in the retroactive versus prospective application of its decision, but reserved judgment on that issue:

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts [and therefore not properly before the Court]. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.

Bacchus, 468 U.S. at 277, 104 S.Ct. at 3058 (footnote omitted). Here, "these refund issues" *were* raised and expressly passed upon in the Georgia state courts. The applicability of *Chevron* was raised, fully considered and passed upon both by the trial court and the Georgia Supreme Court. *See* Final Order of the trial court, Appendix, Exhibit C, at ¶ 9, Conclusions of Law, and *Beam*, 259 Ga. at 364-65, 382 S.E.2d at 96-97.[1]

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[1] The Georgia Supreme Court in applying *Chevron* asserted that "courts . . . have frequently declined retroactive

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In *Bacchus* this Court noted that "[i]t may be . . . that . . . a full refund is mandated by state law," rendering moot the federal constitutional issues involved in the grant or denial of a refund. 468 U.S. at 277, n. 14; 104 S.Ct. at 3058, n. 14. Since in this case state law was determined *not* to mandate a refund, the "federal constitutional issues involved" concern the retroactive application of *Bacchus*, which Beam has called a Due Process issue. Regardless of how it is framed, the issue is clearly and properly before this Court.

III. THE ISSUES PRESENTED IN THIS CASE ARE IN FACT IDENTICAL, FOR ALL PRACTICAL PURPOSES, TO THOSE PRESENTED TO THE COURT IN *MCKESSON* AND ITS COMPANION CASE, *AMERICAN TRUCKING ASSOCIATIONS, INC. V. SMITH.*

A. Whether the Taxes Were Paid "Under Protest" Is Not Controlling.

Respondents contend that Beam has "egregiously misrepresented the facts of this case by stating that the

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application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time." *Beam*, 259 Ga. at 365, 382 S.E.2d at 97. However, one of the cases cited by the Georgia Supreme Court in support of this proposition, *American Trucking Association v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), is being considered by this Court in conjunction with *McKesson* on the very issue of retroactivity. *See American Trucking Associations, Inc. v. Smith*, ___ U.S. ___, 109 S.Ct. 3238 (1989), *former decisions*, 483 U.S. 1014, 107 S.Ct. 3252 (1987); 109 S.Ct. 389 (1988); 109 S.Ct. 1110 (1989), *case below, American Trucking Associations v. Gray, supra*, at p. 3.

taxes at issue here were paid 'under protest'." Brief of Respondents at p. 6. In its Question Presented for Review in its initial Brief, Beam tracked the language of this Court when it framed the issues for reargument in *McKesson* and *American Trucking Associations, Inc. v. Smith, supra*, at pp. 4-5, n.1 (hereinafter "*Smith*"). This is because of the virtually identical factual scenarios, particularly with respect to *McKesson*. However, any inference that the taxes paid in this particular case were paid under protest was purely inadvertent and at no time did Beam represent in the factual summary of this case that Beam had paid the taxes under protest. Furthermore, any confusion generated can hardly be termed "egregious." There is nothing in either *McKesson* or *Smith* to indicate that whether the taxes were paid under protest is any way critical to this Court's consideration of the issues presented in those cases.

B. *McKesson* is Indistinguishable from This Case as Concerns the Controlling Facts.

McKesson, when considered in light of its companion case, *Smith*, is on all fours with the facts of this case. *McKesson* involved a Florida statute granting tax preferred treatment to alcoholic beverages made from locally grown crops. As in Georgia, the Florida legislature, in the wake of *Bacchus*, amended the relevant statutory provisions to comply with that decision. However, the Florida amendments still granted "exemptions or tax preferences to wines and distilled spirits manufactured from citrus, with sugar cane, and certain grape species, all of which will grow in Florida, or from by-products or concentrates thereof, no matter where the point of manufacture . . ."

Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000, 1002 (1988). The trial court found that the amended statutory provision failed to correct the constitutional deficiencies highlighted in *Bacchus*, and held the amended provisions unconstitutional in violation of the Commerce Clause. However, the trial court gave only prospective application to its ruling and denied a refund of the taxes paid under the amended provisions.

The Florida Supreme Court upheld both rulings of the trial court. The Florida court refused to apply *Bacchus* retroactively on the basis that the taxing scheme in question was implemented "in good faith reliance on a presumptively valid statute . . . ," and "if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." Similarly, in the instant case, the Georgia Supreme Court held "retroactive application of the ruling might well result in a windfall to the alcohol producers." *Beam*, 259 Ga. at 365, 382 S.E.2d at 97. Thus, a comparison of the two cases reveals not only factual similarity but identical legal reasoning.

Respondent's argument at pages 6-7 of their Brief that *McKesson* is distinguishable because if involves a post-*Bacchus* statute is unpersuasive. In *McKesson*, as in this case, the issue is whether a taxpayer is entitled to a refund of taxes paid pursuant to an unconstitutional taxing scheme.

American Trucking Association, Inc. v. Gray ("Gray"), supra at p. 3, is the decision appealed from in *Smith*. The refund issue in *Smith* was framed by this Court using the identical language as in *McKesson*. *See* ___ U.S. at ___, 109

S.Ct. at 3238. The 1983 state statute declared unconstitutional under the Commerce Clause in *Gray* was voided pursuant to a United States Supreme Court decision (*American Trucking Associations, Inc. v. Scheiner*, ___ U.S. ___, 107 S.Ct. 2829 (1987)) handed down four years after the statute was promulgated. As in this case, refunds were sought for taxes paid under the statute during the years *prior* to the controlling decision. Thus, that the statute involved in the instant case pre-dated *Bacchus* clearly does not control whether the refund issue is to be considered by this Court.

IV. CONCLUSION

Petitioner's Request for Review should be granted.

Dated: December 11, 1989

Respectfully submitted,

JOHN L. TAYLOR, JR.
Counsel for the Petitioner
James B. Beam Distilling Co.
VINCENT, CHOREY, TAYLOR & FEIL
1700 The Lenox Building
3399 Peachtree Road
Atlanta, Georgia 30326
(404) 841-7832

MORTON SIEGEL
Counsel for the Petitioner
James B. Beam Distilling Co.
SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611
(312) 664-8998